

JD(SF)-68-03 San Francisco, Calif.

**UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD DIVISION OF
JUDGES BRANCH OFFICE SAN FRANCISCO,
CALIFORNIA**

THEATRICAL WARDROBE UNION, LOCAL 784, INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES
AND CANADA

and

Case 20-CB-11109-1

ODESSA MCDUFFIE, an Individual

Shelly Brenner, San Francisco, Calif., for the General Counsel.
Alan G. Crowley, of *Weinberg, Roger & Rosenfeld*, Oakland, Calif., for Respondent

**BENCH DECISION
and
CERTIFICATION**

JAMES M. KENNEDY, Administrative Law Judge: This compliance hearing was tried in San Francisco, California on September 16, 2003. The underlying Board order was issued on March 13, 2003 upon the adoption of Administrative Law Judge Burton Litvack's decision of January 27, 2003. A dispute having arisen concerning the amount of backpay due Charging Party Odessa McDuffie, the Regional Director for Region 20 issued a compliance specification on June 19, 2003. Respondent's revised answer of September 4, 2003 offered an alternative theory regarding the manner in which backpay should be computed.

Upon hearing the evidence, I determined it was appropriate to issue a bench decision under Board rule §102.35(a)(10). Pursuant to Board rule §102.45(a), I hereby attach pages 5257 of the transcript to this decision as the Appendix and certify that it is an accurate transcription of my decision as delivered orally on September 16, 2003. ¹

James M. Kennedy Administrative Law Judge

Dated: September 26, 2003

If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Appendix

23 JUDGE KENNEDY: All right, it is now about 3:35 in the
24 afternoon, and I am here to render the bench decision that I 25
promised. This decision is pursuant to Board Rule

53 PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

1 102.35(a)(10). The way it generally works is that I read my 2
decision into the record, and then I wait for the transcripts 3 to
come in, and I try to make copies of the transcript one way 4 or the
other, either electronic or physical and attach it to a 5
certification. If anybody wishes to take exception to anything 6 I've
said today to take them up to the Board, then they have to 7 wait
until the certification comes out.

8 Necessarily, I think the contract requires that the 9
transcript to come to me in ten days, is that right.
10 Necessarily, I have to wait for that for the certification to 11
come out, but it should be almost instantaneous. After that, I 12
should not have difficulty in dealing with it unless there's 13 some
typographical clean up that has to go on. In any event, 14 this is the
decision, and it may be so shown on the transcript. 15 On January 27,
2003, Administrative Law Judge Burton
16 Litvack issued his decision in this matter finding that the 17
Respondent had violated Section 8(b)(1)(A) and (2) when it 18
failed to **refer the Charging Party Odessa McDuffie** for

19 employment on the stage show, "Evita", in February 1999. No

20 exceptions were taken, and on March 13, 2003, the Board adopted 21 Judge Litvack's decision and order and proposed remedy.

22 A conflict having arisen regarding the amount of back pay 23 due McDuffie, on June 19, 2003, the Regional Director for 24 Region 21 issued a compliance specification alleging that 25 Respondent to make McDuffie whole had to pay her the sum of

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345
54

1 \$4,357.16 as back pay plus an additional \$217.86 for the
2 annuity contribution benefit under the collective bargaining 3 contract.
4 Respondent filed an answer, an amended answer, and at the
5 hearing a second amended answer. The last is a challenge to 6 the manner in which the compliance specification has been
7 calculated.

8 The Region, to calculate back pay, has looked to the unfair 9 labor practice decision in which Judge Litvack found that two 10 individuals, Saladino and Vazquez, were improperly referred to 11 the job ahead of McDuffie. It is determined that from that 12 decision that the back pay period runs from February 17, 1999 13 to March 14, 1999. It also observed that Judge Litvack found 14 that McDuffie was qualified to perform all of the wardrobe work 15 which was assigned to the "Evita" wardrobe staff during that
16 period.

17 The Director was unable to determine whether McDuffie

18 would have taken the [job] assigned to Saladino or the one 19
assigned to Vazquez, but it is clear that it would have been 20 one
of the two. As a result, the Director has averaged the 21 earnings
of those two and that average results in the back pay 22 claim set
forth in this specification.

23 Respondent asserts that because the wardrobe supervisor of 24
the employing entity, a collapsing corporation called Cheva, 25
and I am not **sure of the spelling** of that, Counsel.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345
55

1 MS. BRENNER: C-h-e-v-a.

2 JUDGE KENNEDY: A New York corporation had total

3 discretion in assigning the work, that it is more reasonable to 4
average the earnings of the entire 13 or 14 employee wardrobe 5 staff
over the back pay period. That figure is shown in
6 Respondent Exhibit 1 (b). It is \$3,629.27 plus the 5 percent 7
annuity which was not shown.

8 The compliance **officer, Karen Thompson, has** rejected the 9
Respondent's theory on the grounds that Respondent's list of 10
employees includes individuals whose work on the production is 11 not
representative. This includes employees Fokken F-o-k-k-e-n 12 and
McKain M-c-K-a-i-n who declined day work, and it includes 13 employee
Lepiane who served as "house head" (a union appointed 15 job whose

base pay and annuity is greater than that of regular 15 staff) and employees Jones and Edwards, who did not work for 16 the entire run of the play.

17 I find that the compliance officer's reservations about

18 Respondent's calculation to be valid, even though it might be 19 regarded as reasonable, that is at least Respondent's

20 calculation might be regarded as reasonable. In addition, I 21 find the calculation made by the compliance officer to be 22 reasonable itself. In fact, I find it to be the more

22 reasonable of the two. Choosing an average amount of pay by 24 the two replacement employees who were hired when McDuffie

25 should have been hired is an appropriate method of calculation.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

56

1 It is certainly a reasonable approximation within the meaning 2 of the quote issued by the court of appeals in NLRB vs. Brown 3 and Root, 311 Federal Second 447, 442 8th Circuit 1963 where the 4 court said, "Obviously in many cases it is difficult for the 5 Board to determine precisely the amount of back pay which

6 should be awarded to an employee. In such circumstances, the 7 Board may use as close an approximation as possible and may 8 adopt formulas reasonably designed to produce such 9 approximations." Citing NLRB versus East Texas Steel Castings, 10 NLRB versus Kartarik, Marlin-Rockwell Corporation versus NLRB, 11 and I am leaving out the citations. You can look them up if 12 you want. "We have held with respect to the formula for

13 arriving at back pay rates or amounts, which the Board may deem 14
necessary to devise in a particular situation. Our inquiry may 15
ordinarily go no further than to be satisfied that the methods 16
selected cannot be declared to be arbitrary or unreasonable in 17 the
circumstances involved, citing NLRB versus Ozark Hardwood." 18

Indeed, I do find that there's nothing arbitrary or
19 unreasonable in the Regional Director's back pay specification,
20 and I find that it is, in fact, the more reasonable calculation
21 of the two.

22 Accordingly, to satisfy the back pay specification, to 23
make Charging Party McDuffie whole, Respondent shall pay her 23 the
sum set forth in the compliance specification, \$4,357.16 as 25 wages
and vacation, and it shall also contribute \$217.86 to the

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2245
57

1 annuity fund.

2 Further, based on a stipulation of the parties, it shall

3 also make her whole for out of pocket expenses to maintain her 4
health insurance. This last sum is not liquidated but is

5 calculable by the parties, and Respondent has agreed to pay

6 whatever the sum may be. I think that was supposed to be a 5 7
percent rider amount less than -

8 MS. BRENNER: 9 percent. In the contract for health and 9
welfare, it is -

10 JUDGE KENNEDY: I'm sorry, what was the percentage?

11 MS. BRENNER: 9 percent.

12 JUDGE KENNEDY: 9 percent, okay, 9 percent. I didn't

13 remember that. Whatever it is, the parties are aware of it, 14
and I don't think it is in dispute. That concludes my
15 decision, and I will take questions at this point. Are there 16
any?

17 MS. BRENNER: No, Your Honor.

18 JUDGE KENNEDY: Did I leave anything out?

19 MS. MCDUFFIE: No.

20 JUDGE KENNEDY: At this point, the hearing is closed. 21
(Thereupon, at 3:45 p.m. the hearing was adjourned.) 22 --

000-23

24 25